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No. 87-178

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

PACIFIC GAS AND ELECTRIC COMPANY,
a California Corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Respondent.

REPLY TO RESPONDENT'S BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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I
INTRODUCTION

Pacific Gas and Electric Company ("PGandE") respectfully submits this reply to the briefs in opposition to its petition for writ of certiorari which were filed by the California Public Utilities Commission ("CPUC"), Ultrapower, Inc., GWF Power Systems Company, Basic American Foods, Inc., and the Independent Energy Producers Association ("IEP").

Respondents recite a variety of reasons for denying certiorari. First, the CPUC alone claims PGandE's appeal is untimely because it should have been filed in 1983. Second, respondents argue the FERC rules shelter the challenged prices. Third, respondents claim that the document in dispute—"Interim Standard Offer No. 4" ("interim SO 4")—*sub silentio* provided price certainty even after its fixed price schedules terminated. Fourth, respondents contend that the CPUC's decisions are based on

findings of fact and hence are unreviewable. Fifth, respondents assert that PGandE had a duty to extend unilaterally the interim SO 4 fixed price schedules beyond those approved by the CPUC in 1983. In addition, Ultrapower and GWF contend the CPUC had some independent authority under state law to compel PGandE to pay prices that exceed the federal maximum. These contentions have no merit.

II
PGandE'S APPEAL WAS TIMELY

The CPUC alone asserts PGandE's petition is untimely because PGandE should have appealed the CPUC's original 1983 decision authorizing interim SO 4, rather than contested the CPUC's 1986 decisions that "interpreted" interim SO 4. Since the very issue here is whether or not interim SO 4 contained fixed prices for the time periods now claimed, this argument is really a substantive one masquerading in procedural dress.

PGandE does not challenge the prices that the CPUC approved in 1983, which consisted of fixed prices for firm capacity deliveries beginning by the end of 1987, and fixed prices for energy and as-delivered capacity delivered through 1997. Although even these fixed prices have turned out to greatly exceed the Public Utility Regulatory Act's ("PURPA") maximum of "avoided cost," PGandE has complied with the CPUC's 1983 decision. But PGandE does dispute whether the CPUC's 1983 decision secretly incorporated forecasted prices beyond the 1987 firm capacity prices and the 1997 energy and as-delivered capacity prices. Not until 1986, in the three decisions which PGandE timely appealed, did the CPUC order PGandE to "supplement" the fixed price schedules it had approved in 1983. Since PGandE indisputably sought timely review of those 1986 decisions, the CPUC's current contention that PGandE's petition for writ of certiorari is time-barred is meritless.[1]

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[1] *See, e.g., Chenango and Unadilla Tel. Corp. v. Pub. Serv. Comm'n* 46 A.D.2d 601, 364 N.Y.S.2d 578, 580 (N.Y. Sup. 1975) (petitioners had no complaint concerning Commission's prior order until it issued an order "clarifying" its prior order to their detriment).

III
FERC RULES DO NOT SHELTER THE EXTENDED PRICES

Respondents, in general, claim that the new additional three years of fixed prices mandated by the CPUC in 1986 do not violate PURPA because they were agreed upon and approved in 1983, and thus are sheltered by 18 C.F.R. § 292.304(b)(5) (1987), which states that fixed rates in long-term contracts do not violate FERC rules if the fixed rates differ from actual avoided cost at the time of delivery. PGandE does not argue that the new prices violate PURPA solely because they in fact exceed avoided cost. They offend PURPA because firm capacity prices for 1988-1990 and energy and as-delivered capacity prices for 1998-2000 were *not* negotiated in 1983 and the Commission at no point in time has determined that they represent a reasonable estimate of avoided cost.

IV
NEITHER THE LANGUAGE OF INTERIM SO 4 NOR THE HISTORY OF ITS ADOPTION PROVIDES ANY PROOF OF AN AGREEMENT TO PAY FIXED PRICES BEYOND THOSE SET FORTH IN THE INTERIM SO 4 PRICE SCHEDULES

The interim SO 4 fixed energy prices are based on a fifteen-year forecast approved in 1983. Based on the interim SO 4 requirement that energy deliveries begin within five years of execution, respondents in essence assert that the fifteen-year forecast agreed upon in 1983 was intended to roll forward automatically with interim SO 4's prolonged availability. But adding three years to the 1983 forecast without updating the forecast's assumptions simply converts it into an 18-year forecast. No such intent appears anywhere in interim SO 4 or in the CPUC's decisions.

Respondents' claim also implies that had the CPUC suspended interim SO 4 in 1984, the price forecast would have ended in 1989. Similarly, if the CPUC had not suspended interim SO 4

until 1986, the price forecast would extend to 2001. Yet nothing in interim SO 4 or in the CPUC's 1983 decision approving interim SO 4 suggests that the parties agreed to an indefinite forecast which was to recede or stretch with interim SO 4's availability. To the contrary, the dates employed could hardly have been more specific. Even in Decision No. 86-12-013, slip op. (Cal.P.U.C. Dec. 3, 1986), the Commission acknowledged that "QFs are not inherently *entitled* to indefinite capacity price extension." (Pet. App., p. A-143 n. 2) (emphasis in original)

Interim SO 4 belies unlimited price certainty. Instead, in Article 2 it warns that energy and capacity prices "have wholly *or partly* been fixed at the time of execution." (Pet. App., p. A-187) (emphasis added) The same Article commits the parties only to "the prices fixed in this Agreement," and requires the seller to waive rights to relief only from the "prices set forth in Appendices B, D and E." *Id.*

As respondents note, on October 4, 1985, PGandE petitioned to extend for three more years the firm capacity price schedule approved in PGandE's 1984 test year general rate case decision, Decision No. 83-12-068, slip op., (Cal.P.U.C. 1983), for another standard offer, Standard Offer No. 2 ("SO 2"). Respondents now assert that PGandE's 1985 request to extend the firm capacity price table in SO 2 conclusively proves that the firm capacity price table in interim SO 4 should be extended. The purpose of the SO 2 petition and the lack of any similar petition for interim SO 4 prove quite the contrary.

PGandE petitioned to revise the SO 2 price schedule, which ended in 1988, for QFs who executed SO 2 before the issuance of PGandE's next general rate case decision, when PGandE anticipated a new schedule would be approved. The petition was necessary because CPUC Resolution ALJ-151, issued June 6, 1984, had postponed PGandE's next general rate case for one year. The petition was intended to fill the price gap that the change in the rate case schedule had created. However, before the CPUC acted on PGandE's petition, it suspended SO 2 because the "current capacity price schedules would create a significant potential for overpayment." Dec. No. 86-05-024, slip op. at 27

(Cal.P.U.C., May 7, 1986). PGandE accordingly requested that its petition be withdrawn.

The history of PGandE's petition to extend the SO 2 price schedule is pertinent, but not for the reasons that respondents suggest. First, the filing of the petition demonstrates that PGandE did not take it upon itself to change a standard offer's prices unilaterally, but instead sought prior CPUC approval. Second, had the new extended prices somehow been implicit in the price schedule, no petition whatever would have been required. Third, unlike interim SO 4, SO 2 was based on a methodology developed in evidentiary hearings, and stemming from those hearings, a rationale did exist for extending the price table. Fourth, unlike interim SO 4, SO 2 had no Article 2 committing the parties to "the prices fixed in this Agreement." Finally, as the CPUC stated in 1984 when it refused to amend a price term at respondent IEP's request, interim SO 4 was a "negotiated package," and "a change in one term would require reexamination of all other terms of the standard offer." (Pet. App., p. A-58)

V

THE CPUC'S INTERPRETATION OF INTERIM SO 4 RESTED UPON A CONCLUSION OF LAW

As the CPUC told the California Supreme Court in its answer to PGandE's petition for writ of review, the CPUC's 1986 decisions were based on its interpretation of interim SO 4's "purposes and the intent of the parties, *as manifested in the Commission decisions that originally approved the agreement and directed its development.*" (CPUC Answer, pp. 2-3) (emphasis added) The CPUC never held hearings or heard evidence concerning interim SO 4's meaning or the parties' intent.

The CPUC had the option of holding a hearing on the various petitions for modification to extend the interim SO 4 price tables. *See* Cal. Admin. Code tit. XX, R. 8.1, 8.2. But no party requested evidentiary hearings and the CPUC chose not to conduct any. Only legal briefs, which under Cal. Pub. Util. Code § 1710 and Cal. Admin. Code tit. XX, R. 14.5 cannot be treated as evidence, were submitted. Moreover, as the California Supreme Court

stated in *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 104 (1970), quoting *English v. City of Long Beach,* 35 Cal. 2d 155, 158 (1950):

> In California, administrative tribunals which are required to make a determination after a hearing cannot act upon their own information and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.

In the absence of extrinsic evidence, the interpretation of written documents presents questions of law, not questions of fact. Contrary to respondents' assertions, mere denomination of the CPUC's interpretation as findings of fact does not transform its interpretation from a legal to a factual conclusion. Thus, the CPUC's decisions rested exclusively on conclusions of law, which do not merit the special deference owed administrative fact-finding.

VI

PGandE COMPLIED FULLY WITH THE COMMISSION DECISIONS AUTHORIZING INTERIM SO 4 IN DRAFTING AND INTERPRETING INTERIM SO 4

Respondents assert that the CPUC's 1983 decision authorizing interim SO 4 required PGandE unilaterally to add three additional years of fixed prices to the original interim SO 4 fixed price tables. Some claim that PGandE did not properly implement Decision No. 83-09-054 (Pet. App., p. A-2) when it initially prepared interim SO 4. Others assert that PGandE violated Decision No. 83-09-054 by not independently updating and extending the interim SO 4 price schedules. Both contentions are wrong, because the three price schedules at issue are identical to the price schedules that PGandE submitted to the CPUC in 1983, and identical to the price schedules that the CPUC approved without change in Decision No. 83-09-054. The schedules contained firm capacity prices only through 1987, and fixed energy and as-delivered capacity prices only through 1997. Since these schedules were computed prior to the 1983 decision, and the decision did not order any modifications to them but instead

approved them, the schedules fully complied with Decision No. 83-09-054.

Decision No. 83-09-054 also did not obligate PGandE to update or extend the interim SO 4 price schedules that it approved. In Decision No. 83-09-054, CPUC stated that revisions to the 15-year forecast embodied in the fixed price schedules "can be addressed in the subsequent hearings." Thus, the mechanism for any revisions was to be CPUC hearings and orders based on those hearings, not unilateral utility action. PGandE could not have changed interim SO 4 without a CPUC order. Making unilateral changes in the terms of interim SO 4 would have placed PGandE in violation of CPUC orders barring a utility from altering any of the terms of a standard offer except upon order by the CPUC or at the specific request of QF for nonstandard, negotiated terms. *See, e.g.,* Dec. No. 85-06-163, slip op. at 24-26 (Cal.P.U.C., June 21, 1985). In two later decisions issued before interim SO 4 was suspended, the CPUC specifically refused to alter the price provisions of interim SO 4 in any way whatsoever. *See* Dec. No. 83-12-050, slip op. (Cal.P.U.C., Dec. 20, 1983) (Pet. App., p. A-50); Dec. No. 84-08-035, slip. op. (Cal.P.U.C., Aug. 1, 1984) (Pet. App., p. A-56). PGandE had no duty to extend on its own volition the price schedules that the CPUC had approved in 1983.

VII
THE CPUC DID NOT EXERCISE INDEPENDENT STATE AUTHORITY IN ORDERING THE PRICE EXTENSION

Ultrapower and GWF contend at length that the CPUC had independent authority under state law to order PGandE to pay QFs prices that exceed avoided cost.[2] But, as the CPUC (p. 3),

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[2] Contrary to GWF and Ultrapower's contentions, PGandE does not and has not conceded that *Consolidated Edison Co. v. Public Serv. Com'n,* 63 N.Y. 2d 424, *appeal dismissed,* 470 U.S. 1075 (1985) was correctly decided. PGandE only noted that the validity of that decision need not be reached, because the CPUC did not invoke independent state authority to justify either interim SO 4 or its extension of the interim SO 4 fixed price schedules.

Basic (p. 12, n. 11) and IEP (p. 10) concede, the CPUC has never invoked any independent state authority to support its decisions. Consequently, Ultrapower and GWF's argument is mere digression.

VIII
CONCLUSION

For these reasons, the Court should issue a Writ of Certiorari to review the judgment and opinion below.

Respectfully submitted,

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